

REPUBLIC OF KENYA
HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 118 OF 2008

ROSEMARY MUTHONI MUNDIA APPELLANT
VERSUS
JAMLECK KIMOTHO RESPONDENT

(Being an appeal from the Judgment of the Hon. B.J. NDEDA (SRM) in the Resident Magistrate's Court at Gichugu Civil Suit No. 8 of 2007)

J U D G M E N T

This is an appeal from the decision of the Senior Resident Magistrate at Gichugu in which he gave judgment in part to the Appellant who had sued the Respondent over an agreement in regard to a plot at Kutus old town. In the plaint the Appellant had claimed breach of contract on the part of the Respondent who had not paid kshs.240,000/= being the balance of the purchase price. Also sought was kshs.80,000/= which the parties had agreed to be paid as liquidated damages by the party in breach. The trial court did not allow this amount, and further ordered that each party to his/her own costs. The court ordered the payment of kshs.240,000/=. It is the order not allowing the payment of kshs.80,000/= and the order in regard to costs that form the basis of the this appeal.

From the pleadings and the recorded word, this was a straight forward case. The Appellant was a partner in plot No.8B Kutus old town. In a signed agreement, the Appellant sold her share to the Respondent at kshs.800,000/= and acknowledged receipt of kshs.423,000/=. The plot had tenants. The Appellant was to give them notice to vacate. At the expiry of the notice the Respondent was to pay the balance of kshs.337,000/= to the Appellant. The tenants vacated leaving one tenant called Stephen Wambugu Mwai. On 6th February 2008, the Appellant through Magee wa Magee Advocates issued him with a 21 days notice to vacate. At the expiry of the notice, I find, the kshs.337,000/= became payable. It was not the agreement that the balance would be paid on vacant possession.

It was acknowledged that the Respondent had since paid part of the balance, leaving kshs.240,000/=. When the Respondent did not pay the full balance on the expiry of the notice, there was breach of the contract. I find there was no breach on the part of the Appellant.

The result is that the Appellant was entitled to judgment in the sum of kshs.240,000/=. Clause 5 of the signed agreement indicated that the party in breach was liable to pay to the other all the expenses incurred at the interest rate of 35% plus kshs.80,000/= being mutually agreed as the liquidated damages. The plaint did not indicate that any expenses were incurred. However, the kshs.80,000/= was payable as agreed liquidated damages.

Under section 27 of the Civil Procedure Act costs follow the event. A party who has succeeded is entitled to costs, unless there are good reasons for not paying him. Such reasons have to be indicated.

I allow the appeal with costs. The judgment of the lower court will be substituted with judgment in favour of the Appellant against the Respondent for a total of kshs.320,000/= together with interest at court rates and costs. If the Respondent has already paid kshs.240,000/= as indicated in the written submissions by his counsel, what is payable shall be kshs.80,000/= together with interest and costs.

DATED, SIGNED AND DELIVERED AT EMBU THIS 19TH DAY OF SEPTEMBER 2011

A.O. MUCHELULE
JUDGE